DATE: January 21, 1998

CASE NO: 95-INA-380

In the Matter of

ADAM NOVAK
Employer

on behalf of

KRYSTYNA TYSZKA
Alien

Appearances: Mark Broydes, Esq.
for Employer

Before: Guill, Jarvis, and Vittone
Administrative Law Judges

DONALD B. JARVIS
Administrative Law Judge

DECISION AND ORDER

This case arises from Adam Novak's ("Employer") request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of alien certification. The certification of aliens for permanent employment is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under §212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of the United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other means in order to make a good faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in the appeal file ("AF"), and any written arguments. 20 C.F.R. §656.27(c).

Statement of the Case

On July 10, 1992, the Employer filed a Form ETA 750 Application for Alien Employment Certification with the New York Department of Labor ("NYDOL") on behalf of the Alien, Krystyna Tyszka. (AF 1-5). The job opportunity was listed as "Housekeeper". The job duties were described as follows: "cooks all meals, cleans the house, windows, laundry, food shopping". The stated job requirement for the position, as set forth on the application, included 3 months of experience. Special requirements included "must live in as there are frequent and unexpected visits from business resulting in late dinner parties" and "employee must not smoke". The work schedule was 8 a.m. to 5 p.m., 40 hours per week. (AF 5).

In response to NYDOL's concerns regarding the work schedule, the Employer amended Form ETA 750 as follows: work schedule: Monday - Friday: 8 a.m. to 12 p.m., 4 p.m. to 8 p.m.; Saturday: 2 p.m. to 6 p.m.; 44 hours per week. (AF 5, 8, 10).

NYDOL transmitted resumes of five applicants to the Employer. The Employer indicated that none of the U.S. applicants was hired. (AF 60-61, 74). The file was transmitted to the CO.

The CO issued a Notice of Findings ("NOF") on July 25, 1994 proposing to deny the certification for the following reasons: 1) the Employer has failed to establish that "his requirements for the job opportunity are the minimum necessary for the performance of the job and that he has not hired or that it is not feasible for him to hire workers with less training and/or experience." The CO found that the alien gained the required 3 months experience while working for the Employer in violation of Section 656.21(b)(5); 2) The job requirements are unduly restrictive in violation of Section 656.21(b)(2). The CO found that the requirement that the worker live on the Employer's premises is not normally required for the occupation, and there was no evidence of a business necessity. In addition, the required hours are unduly restrictive. The CO found that the job duties could be performed by a live-out worker during a normal live-out schedule of 9 a.m. to 5 p.m. or 8 a.m. to 4 p.m. The Employer could rebut the finding by either amending the application to delete the live-in requirement or submit evidence documenting a business necessity for the live-in requirement. (AF 75-77).

The Employer submitted his rebuttal on August 23, 1994. (AF 83). It consisted of a letter from the Employer's attorney. The Employer offered to delete the 3 month experience requirement. Also, the Employer dropped the live-in requirement and instead offered it as a fringe benefit. In addition, the Employer requested that the work schedule be changed to "12 p.m. to 8 p.m." and that the job duties be amended to include "serves meals".[1] (Id.)

The CO issued a second NOF on September 9, 1994, proposing to deny certification because the job requirements were unduly restrictive. The CO noted that the Employer was no longer requiring the worker to live on the premises, but was instead offering it as a fringe benefit. The CO again found that there was no business necessity for a live-in requirement. The CO stated that the Employer could rebut this finding by either amending the application to delete the restrictive requirement and offer the position as only a live-out position, or it could submit evidence documenting a business necessity; the Employer must offer a salary of $304.48 per week plus free room and board for the live-in position and offer $322.40 per week for the live-out position. Also, the CO found that the hours of employment were restrictive for a live-out position. In addition, the CO found that the requirement that the employee must not smoke was restrictive. (AF 84-87).

The Employer submitted his rebuttal on October 17, 1994. The Employer deleted the "no smoking" requirement and amended the salary to $322.40 per week. The Employer argued that he needed the worker to stay until 8 p.m. each day because of his schedule. The Employer does not arrive home from work until 7 p.m. at which time he eats dinner. The worker's duties include cooking dinner and cleaning up after dinner. (AF 94).

The CO issued a Final Determination ("FD") on October 25, 1994 denying certification because the job requirements were unduly restrictive. The CO rejected the Employer's business necessity argument and found that both the scheduled hours and live-in requirement were unduly restrictive. (AF 95-97).

On November 29, 1994, the Employer filed a timely Request for Review. (AF 110-112).

Discussion

In the first NOF, the CO found that the Employer's live-in requirement was unduly restrictive. The CO found that the requirement that the worker live on the Employer's premises is not normally required for the occupation of a housekeeper. The CO rejected the Employer's justification for the requirement. The CO stated:

> "Employer states in the letter that the size of the apartment, his age and life style require a live-in house worker. In addition, employer indicates that he frequently entertains at home at various hours for business reasons. However, employer failed

[1]The Employer never amended the ETA 750a form to include these hours or to include "serves meals". (AF 103).

to submit an entertainment schedule. We note that employer's household consists of two adults and no children. The fact that the houseworker general [sic] will serve meals and clean up does not justify the need for a live-in worker." (AF 75-76).

The Employer was given the option of either deleting the live-in requirement or submitting evidence to document a business necessity for the requirement. (AF 75). The Employer elected to delete the live-in requirement, and offered free lodging on the premises as a fringe benefit. (AF 83).

In the second NOF, the CO found that the Employer was still requiring a live-in worker, and that he failed to document a business necessity for the live-in requirement. The CO treated the fringe benefit offer, as an offer for a second position - a live-in position as opposed to a separate live-out position.[2] The Employer was given the option to either delete the restrictive requirement and offer the position as a live-out only or he could submit evidence to document a business necessity. (AF 84-86). The Employer failed to do either. In the FD, the CO again found that the Employer failed to document any business necessity for the live-in requirement.

We agree with the CO that the Employer's offer of free lodging on the premises as a fringe benefit is in reality a live-in requirement, and as such, the Employer has failed to document any business necessity. On its face, it appears that the Employer deleted his live-in requirement. However, the Employer's fringe benefit offer of free lodging is really masking a live-in requirement. By giving the prospective employee the option of choosing to live on the Employer's premises, the Employer is effectively offering two separate positions, a live-in position and a live-out position, of which only one of the positions would be filled. The offer of free lodging gives the appearance that the Employer would prefer a live-in housekeeper, thereby discouraging live-out housekeepers from applying. In addition, the Employer's offer of free lodging gives additional compensation to a live-in housekeeper since the Employer was offering the same salary for both positions.[3] A live-out housekeeper would receive less compensation which would discourage prospective live-out applicants from applying. In sum, the Employer's fringe benefit offer is effectively a live-in requirement.

Where the worker is required to live on the employer's premises, regardless of whether the employer is a commercial or non commercial enterprise, the requirement will be regarded as unduly restrictive unless the employer establishes that it arises from a business necessity. 20 CFR Section 656.21(b)(2)(iii). In the context of a domestic live-in worker, the relevant "business" is the "business" of running a household or managing one's personal affairs. Marion Graham, 88-INA-102

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[2]While the CO's analysis was not a model of clarity, we believe that it afforded the Employer sufficient notice that the Employer's fringe benefit offer was effectively still a live-in requirement. The CO clearly stated that the Employer must either offer the position as only a live-out position or document a business necessity for the live-in requirement. (AF 85).

[3]In the NOF, the CO stated that the Employer must offer $304.48 per week plus free room and board for the live-in position and $322.40 per week for the live-out position. (AF 84).

(Feb. 2, 1990)(en banc). To establish the business necessity for a live-in requirement for a housekeeper, the employer must demonstrate that the requirement is essential to perform, in a reasonable manner, the job duties as described by the employer. Business necessity will not be established where those duties can reasonably be performed by an employee who does not live on the premises. Janet Reda, 93-INA-191 (Apr. 2, 1995); Nandita Chowdhury, ,93-INA-181 (Apr. 19, 1994).

We agree with the CO that the Employer has failed to establish a business necessity for the live-in requirement. The Employer's requirements that the worker prepare meals and clean the house could be satisfied by a live-out worker, even if the worker's schedule does not coincide with the Employer's. A live-out worker could prepare meals that can be heated upon the Employer's return. In addition, a live-out worker can do the dishes the next morning. The Employer's desire for freshly cooked meals does not establish that a live-in worker is a business necessity; instead, it merely shows that a live-in worker would be more convenient. See, e.g., Janet Reda, 93-INA-191 (Apr. 2, 1995); Nandita Chowdhury, ,93-INA-181 (Apr. 19, 1994); Mary Stafford, 88-INA-155 (Mar. 12, 1990).

The Employer's attorney, in his appeal brief, also argues that if the dishes are not cleaned after dinner by the worker, there would be a sanitation problem because of the prevalence of roaches, mice and rats in New York City. We will not consider this representation because unsupported assertion's by an employer's attorney do not constitute evidence (Wilton Stationers, Inc., 94-INA-232 (Apr. 20, 1995)), and evidence first submitted with a Request for Review will not be considered. La Prarie Mining Limited, 95-INA-11 (Apr. 4, 1997). Even if the Employer could establish that a rodent problem exists, we believe that the Employer could take steps to minimize the threat rather than require the services of a live-in worker.

Since we find that the CO properly denied certification because the Employer failed to document a business necessity for the live-in requirement, it is not necessary to address the issue of whether the Employer's work schedule requirement is unduly restrictive.

Order

The Certifying Officer's denial of labor certification is affirmed.

For the Panel:

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DONALD B. JARVIS
Administrative Law Judge

San Francisco, California